#### You make the existence of your policy contingent on the interest of legislators – this deference to constitutional and legalistic authority legitimizes oppression and authoritarianism

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Because law is a major tool of social and political power, and because it is the primary instrument for a government to legitimate itself and accomplish its objectives, law is vulnerable to "capture" for substantively authoritarian purposes. Law may always be authoritarian in the formal sense, because a major premise of law is that people will accept and obey it absent some extraordinary justification.24 Yet, a jurisprudential preoccupation with the duty to obey law and the authority of law25 overlook law's tendency to validate and facilitate oppression and violence, whether by the state directly or by private actors with tacit state approval. Judges may participate in authoritarian uses of law by unquestioning obedience to rule and other authorities, by using stereotypical reasoning, by upholding the status quo and hypostatizing power relationships, and by taking a punishing attitude towards disobedience.? As Robert Cover noted and .David Luban recently argued, the Supreme Court, in the case of Walker v. City of Birmingham,27 engaged in authoritarian decisionmaking by holding that civil rights marchers could be punished for disobeying an injunction the Court had declared unconstitutional. Professor Luban concluded that the Court in Walker, "[flacing a choice between the anti-authoritarian consequences of liberal constitutionalism and the overwhelming desire to maintain reverence for authority, . . opted for the latter.' 2 With the decline of liberal thought and politics in the United States, much of the constitutional jurisprudence of the 1980s has become particularly facilitative of authoritarian uses of law by providing theoretical justifications for those uses. A distrust of judges and judicial power exercised in a certain liberating way has been the target of some "conservative" scholars. Thus, arguments by conservative constitutional scholars invariably seek to curtail the ability of judges to interpret positive law by demanding obedience to law, narrowly defined. The demand on the part of some scholars for strict adherence to original intent, obedience to text, deference to the political branches-particularly the executive branch-and strict fidelity to precedent and stare decisis, combined with arguments emphasizing stability, order, predictability and control, is especially troubling. To the extent that such positivist views of judging can be associated with authoritarian legal systems, these arguments can legitimate tyranny. To the extent that adherence to text and legislative command renders judges powerless to prevent legally constructed oppression or repression, the likelihood of formal authoritarianism in law, at a mimmum, increases. 29 Other scholars make more substantively authoritarian arguments. Judge Posner's visions of human nature, law and the need for acceptance of authority have been criticized elsewhere as being authoritarian ° and will be criticized here as well. Additionally, some communitarian or civic republican scholars present the danger of substantive authoritarianism. For these scholars, community and public virtue take priority in law; one does not have to be an atomistic, selfish liberal to be concerned that arguments that the community takes precedence provide a justification for "aggressive majoritanamsm' 1 3 and repressive, punitive or oppressive uses of law against outsiders. There are, however, some avenues of scholarship that exist or are being explored which could combat the tendency to use law in authoritarian ways. In the conclusion of this Article, I will suggest that there are at least two major alternatives to authoritariian legal thought which are consistent both with legality and with humanitarian systems. My choice of these alternatives is based not only on the fact that they are at least descriptively and theoretically inconsistent with authoritarianism, but also on the existence of empirical evidence suggesting the value of these approaches in combatting authoritarianism. These two alternatives are the jurisprudence of strong rights and individual human dignity32 and the fermst/nunority/humarust jurisprudence of understanding and care for others.3 These two orientations somewhat resemble the different models of moral decisionmaking developed by Kohlberg and Gilligan; rather than being seen as antagonistic, the models might very well be capable of combination, as suggested by the writings of some scholars. 34 These approaches both share the similar concerns of valuing human beings and of resisting cruelty, subordination and oppression, in whatever guise.

#### Your idealization of obedience to constitutional authority legitimizes oppression and exclusion

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Arendt's defense of traditional sources of authority should not strike legal scholars as unfamiliar or strange. Much of law is based on following traditions and respecting legal authority and process. Undoubtedly, most lawyers believe that law is necessary to the ordering of human affairs, and some believe that respect for legal authority is essential to human happiness and moral behavior. Therefore, the legal actor generally accepts legal authority as good, although she may dispute particular exercises of that authority. The precepts of that authority are followed and obeyed and defended- out of this acceptance. 6 Arendt made the observation that the founding fathers and the Constitution, as sources of authority, played the same role in the United States as the founding of Rome had played for the authoritarian Roman empire. 69 Similarly, a number of constitutional scholars and judges have argued that the source for authority is in the past-in the founding constitutional moment, the super-human, parental qualities of the drafters and the text.70 Because the authority of the founding moment is good, the Constitution's authority is good. The goodness of the founders becomes the goodness of the Constitution; the authority of the Constitution therefore must never be challenged because it is good. Although this argument conflates legal and moral norms and simply makes the legal the right and the good, it is not an unfamiliar posture. Rather, it resembles Arendt's description of the role of the founding moment in authoritarian systems. The argument for uncritical acceptance of authority can quickly lead to more severe forms of authoritarianism. As soon as uncritical acceptance of and obedience to authority become the norm, the accepted authority has the power to oppress, to punish, to repress and to dominate. For example, the well-known Milgram studies provide a chilling example of authority's power to command obedient persons to inflict pain on others in order to punish them . 7 Arendt sought to preserve the value of obedience to authority by distinguishing authoritarianism from totalitarianism, but even authoritananism in her formal sense-obeying because the authority is accepted by tradition and practice-can quickly become authoritarianism in a substantive, negative sense. While her distinction between totalitarian and authoritarian illustrates a point on a continuum that ranges from benign or humanistic authority to gulags or death camps, unfortunately the distinction has deflected attention from description and analysis of repressive regimes that are not totalitarian, that is, completely dominant over their citizenry.7 2 For example, the United States government used Arendt's distinction to legitimate a difference in policies toward brutal right-wing regimes and those on the left, thereby muddying the point that some authoritarian governments are more repressive in more ways than others, whether they are right-wing dictatorships such as the Pinochet regime in Chile, or communist dictatorships such as the Romanian regime of Ceausecu.7 Accordingly, the term authoritarian has taken on a different connotation in much political and psychological writing, one that is negative and critical. In this context, authoritarianism embodies specific combinations of personal, group and political orientations and outcomes. In some ways, authoritarianism is a difficult concept because so often it is more of a tone or orientation rather than an easily identifiable category of definitive traits or characteristics. Further, authoritarian refers both to an individual's use of and attitude toward authority as well as to particular political structures with many of the same characteristics. Generally, however, the authoritarian world-view holds a vision of human beings as monsters; this vision pervades its justifications for authority, control, punishment, and obedience. 74 Authoritarian systems and individuals may be more or less repressive, punitive and hostile to certain beliefs, activities or groups. They may be leftist or right-wing in their ideologies and politics, but they nevertheless share some common characteristics. Perhaps as a result of the history of the United States and the original concerns of researchers, right-wing authoritarianism has been the primary focus of research on authoritarian movements in this country and on the authoritarian personality.75 For example, Professor Lipset has argued that, historically, the authoritarian political orientation in the United States has been a combination of social conservatism and nativism with nineteenthcentury visions of laissez-faire economics. 76 In the United States, authoritarian movements have been associated with traditional moralism, support for the status quo, the belief in the necessity of maintaining order, an emphasis on obedience to government as essential to avoid anarchy, and antipathy toward new ideas. Similarly, concern with right-wing movements was the impetus for research on the authoritarian individual. The notion of the authoritarian personality7 was developed by some members of the Frankfurt school in exile in the United States as part of an effort to understand what influenced the rise of naziism and anti-semitism in Germany. 79 The notion of the authoritarian personality still has descriptive force, although interest and research support virtually disappeared during the Cold War era. 0 Although there has been much dispute about the psychodynamic interpretations of the authors, the validity of the usual instrument used to measure "authoritarian" personality (the F-scale)8' and other portions of the study, subsequent studies and measures have resulted in similar descriptions of what constitutes an authoritarian orientation. According to a number of studies, the authoritarian individual values and follows rules. She is rigid, inflexible and intolerant of difference.12 The prototypical authoritarian person has a low tolerance for ambiguity, adopts conventional behaviors and beliefs and is prone to negative stereotypy Authoritarians may be cynical, distrustful, intolerant, moralistic, anti-democratic and nationalistic. 3 Authoritarians are unlikely to have much empathy for the suffering or pain of others" and are likely to be prejudiced against racial, religious and ethnic "outgroups."8 3 Further, authoritarians tend to support patriarchal beliefs, prejudices and stereotypes about women and sexuality 86 Authoritarians obey and demand obedience to authority's commands simply because they are commands, and they hold a harshly punitive attitude toward those who do not comply 87 The authoritarian does not hold independent judgments about the goodness or value of rules and finds challenges to rules or settled understandings deeply threatening. The authoritarian individual obeys authority either to escape punishment or because she has thoroughly introjected-made a part of her identity-the authoritative definition of her status and role."8 Thus, strict compliance with rules can arise either from fear or introjection of authority Erich Fromm posited that the authoritarian masochistically obeys those hierarchically above her and sadistically punishes those beneath her or deviant from her, whether she is conscious of the sado-masochistic dynamic or not; obeying and pleasing the authority is the most important goal for the authoritarian. 9 The authoritarian's emphasis on obedience enables her to persecute, torture or oppress others- without guilt and perhaps even with pleasure at the behest of the idealized or introjected authority 90 Authoritarians have the "[tlendency to be on the lookout for, and to condemn, reject, and pumsh people who violate conventional values."'" They reject "the subjective, the imaginative, the tender-minded, ' 92 (meaning the compassionate); the authoritarian view of human nature is negative and suspicious, in keeping with a Hobbesian vision of the world.93

#### The emphasis on rule of law legitimizes atrocities in the name of obedience to authority and abdicates personal moral responsibility – the constitution has justified subjugation and enslavement of minorities

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Despite our cultural assumption that the Rule of Law automatically prevents tyranny and oppression-the bicentennial celebration of the Constitution was notably silent about the fact that the original document legitimated the enslavement of an entire race of people' ' 5 -this section argues that there is nothing intrinsic to the Rule of Law that prevents authoritarianism. Indeed, there is a paradox present in the understanding of the Rule of Law in this culture, including the legal culture. On the one hand, the Rule of Law is invoked as a guaranty against tyranny On the other hand, it is invoked to require unquestioning obedience to law, no matter what its content. Both of these claims emphasize process although, under some views, the Rule of Law embodies the substantive values of rights, liberties and liberal democracy Another tension identified by Margaret Radin exists in legal scholarship between what she terms "instrumental" views and "substantive" views of the Rule of Law. This tension reflects the paradox as well: "The instrumental conception [of the Rule of Law] is a model of government by rules to achieve the government's ends, whatever they may be. The substantive conception is a model of government by rules to achieve the goals of the social contract: liberty and justice." 6 For many legal scholars, as well as political actors, the privileged understanding of the Rule of Law and its virtues ' " endows it with the substantive characteristic of preventing tyranny and oppression."' As E.P Thompson wrote in his historical study of the oppressive Black Act in England, the development of the Rule of Law is usually seen as an "unqualified human good."" 9 Familiar to most are the favorable views of the Rule of Law captured by Thomas Paine's declaration that in America, "'the Rule of Law is King.1'2 0 and the statement that the government of the United States is a government of laws, not men [sic].' 2 ' Although historical development of the idea that law binds the politically powerful and the governors as well as the governed was an unquestionable improvement over the abuses of whimsical and arbitrary tyrants, this fact alone does not ensure that the Rule of Law is the Rule of good Law, as Joseph Raz has written.'2 Even the prime virtue of the Rule of Law, that all are bound by it, does not dictate the content of the law There is nothing intrinsic to the Rule of Law that entails absolute or even partial protection of individuals or groups from tyranny and oppression, despite our habitual use of the Rule of Law in this sense.123 It is perfectly consistent to have an authoritarian state under the Rule of Law, for although the Rule of Law establishes that "government shall be ruled by the law and subject to it," the form of government under law may be a dictator, an oligarchy or a democracy. 24 For example, South Africa is an authoritarian state operating under Rule of Law principles, but it cannot be termed a free society even though it is a democracy for the white mnority and has a written constitution.12 5 Similarly, the government of the United States has tyrannized whole populations, including African-Americans, Native Americans and Japanese Americans, under the Rule of Law. Further, the Rule of Law has another authoritarian aspect: the Rule of Law requires obedience to authorities constituted by law and signifies the state's power of social control. Although Spiro Agnew and Edwin Meese might be caricatures of this meaning, their (at times exaggerated) "law and order" rhetoric hardly diminishes its force, even among legal scholars. As Joseph Vining has asserted, law depends on obedience: "Any theory [of law], indeed any conception of system in human affairs, contains an unstated and usually unexamined assumption that people will follow the law. If people don't follow the law, they could be required to."'' 2 And as Robert Cover so eloquently reminded us, the agents and institutions of the law have the power to compel obedience by force if it is not forthcoming and to punish disobedience.1 27 Finally, as Margaret Radin has noted, the Rule of Law assumes that "rules are supposed to rule" 2 no matter what their moral content. Thus, the Rule of Law may be malicious or benign, and laws and rules may be harsh and punitive or humanitarian. For one dedicated to law, it is difficult, to appreciate that law often facilitates the abuse of power and is both directly and indirectly implicated in human suffering: the Hart-Fuller debate about whether Nazi German did or did not have law-a debate that has continued in various forms' 29 - might reflect the legal scholar's wish to deny law's complicity with evil.'30 Hart had argued that the natural law argument that law must meet the "nummum requirements of morality"' 3 ' or not be law at all was mistaken: to conflate what is and what ought to be "will serve ... only to conceal the facts."'3 2 The problem of Nazi Germany was not that law was invalid as "contravening the fundamental principles of morality," but that for some reason, the separation of law and morals "acquired a smister character in Germany."' 33 Fuller responded that law must have an inner morality to be law at all, claiming that Nazi Germany's laws violated that inner morality by violating the Rule of Law virtues of nonretroactivity, publicity and disregard of the duly promulgated legal texts that were in place, and that therefore Germany had no law during the Nazi regime. 34 In defense of the Rule of Law's virtue, Fuller wrote: To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality . . it is not hard for me, at least, to deny to it the name of law '31 Ffiller was correct in stating that Rule of Law virtues do exclude some methods of using law to realize authoritarian goals: requiring that government and its officials be bound by the law, requiring that laws be applied equally and foridding the use of secret or retroactive laws can diminish abuse. 36 Yet, because Rule of Law virtues are not inconsistent with evil law, these procedural goods under the Rule of Law are a necessary but insufficient safeguard against authoritarian regimes.137 Authoritarianism i**s** not arbitrariness, whim, or caprice-it is unremitting insistence on obedience and punishment of those who disobey Thus law, like all forms of normative authority, can easily carry within it the seeds of oppression, intolerance and demands for blind obedience without necessarily violating Rule of Law precepts. Unless one stretches the meaning of the Rule of Law to include the substantive requirements of reciprocity, fairness, and respect for persons on the part of the state, 38 there is little to prevent authoritarian abuses under law The Rule of Law may therefore offer little more than symbolic comfort to those concerned with the use of law to oppress and punish human beings.

#### Moral norms should always precede legal standards – the authority of positive law relies on the moral law, because we must be obligated to obey the law before it has any meaningful authority on our actions. However, because the authority of positive law depends on the moral law it means that if the law is unjust it has no authority.

**Aquinas**, Thomas.  Summa Theologiae I-II, q. 96, a. 4, translated by Fathers of the English Dominican Province

I answer that, **Laws** framed by man **are either just or unjust. If** they be **just**, **they** have the power of **bind**ing in **conscience**, **from the eternal law** **whence they are derived**, according to Proverbs 8:15: "By Me kings reign, and lawgivers decree just things." Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good--and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver--and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good. For, since one man is a part of the community, each man in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole; wherefore nature inflicts a loss on the part, in order to save the whole: so that on this account, such laws as these, which impose proportionate burdens, are just and binding in conscience, and are legal laws. On the other hand **laws may be unjust** in two ways: **first, by being contrary to human good**, through being opposed to the things mentioned above--either in respect of the end, **as when an authority imposes** on his subjects **burdensome laws**, conducive, not to the common good, but rather **to his own cupidity** or vainglory--or in respect of the author, as when a man makes a law that goes beyond the power committed to him--**or** in respect of the form, as **when burdens are imposed unequally** on the community, although with a view to the common good**.** The like are acts of violence rather than laws; because, as Augustine says (De Lib. Arb. i, 5), "**a law that is not just,** seems to **be no law at all."** Wherefore **such laws do not bind in conscience**, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matthew 5:40-41: "If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two."

Thus the alternative – college campuses ought not restrict not restrict constitutionally protected speech that is used to advocate for animals.

#### That’s mutually exclusive –a. doing the resolution intensionally and extensionally are mutually incompatible -- if I’m friends with Obama, I might say that I’ll do whatever the president asks of me in 2010. If I’m a lover of government, I also might say that I’ll do whatever the government wants in 2010. But I can’t say that I’ll do whatever the government wants, intensional, and whatever the government wants, extensional, since if Trump and Obama ask me to do two opposite things then it’s impossible to do both.

– the aff changes in light of changing constitutional norms, putting trust in constitutional authorities, while the neg says that we should do the aff in spite of what the constitution says, b. the constitution can change – constitutional interpretation is in flux as new forms of speech develop, the aff fiat extends to those future changes, but the neg only enforces current protections, c. competes through net benefits – the counterplan avoids the criticism of constitutional deference

# 2nr

The reason you are negating is that the aff did not read topical offense. The resolution does not ask if free speech is good, or even if the free speech that the constitution currently protects is good. The resolution states that we should ensure constitutionally protected speech. You conceded in CX that you defend the resolution intensionally and defer to whatever the constitution protects. However, your offense does not give reasons for why we should so defer.

The NC solves the aff offense, since the aff only says free speech is good, not that constitutionally protected speech is good.

If I want to teach at a school I may have to agree to follow the school rules. There is a huge difference between agreeing to follow the rules currently at play, and saying I will follow the schools rules whatever they may be. The aff erases this difference which means they are not answering the resolutional question.